



**FILED**

Sep 26 2008, 10:25 am

*Beverly Smith*

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of the supreme court,  
court of appeals and  
tax court

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**  
Attorney General of Indiana

**IN THE  
COURT OF APPEALS OF INDIANA**

DAMIAN JONES, )  
 )  
 Appellant-Defendant, )  
 )  
 vs. ) No. 02A03-0803-CR-96  
 )  
 STATE OF INDIANA, )  
 )  
 Appellee-Plaintiff. )

**September 26, 2008**

**FRIEDLANDER, Judge**

Damian Jones appeals his convictions for Criminal Confinement,<sup>1</sup> as a class B felony, and Battery,<sup>2</sup> as a class C felony. As his sole issue on appeal, Jones claims these convictions violate the Indiana Constitution's prohibition against double jeopardy.

We affirm.

Ebony Williams and Jones dated for several months before Williams ended the relationship in June 2006. Based upon Jones's threatening actions over the ensuing months, Williams obtained two no-contact orders against him. Despite the no-contact orders, Jones went to Williams's home on December 27 and attacked her.

The attack occurred around 10:30 p.m., as Williams was taking trash to the end of her driveway. Jones suddenly came up behind her and placed her in a chokehold with his left arm. Jones stated, "I told you about fucking with me. I told you I was going to get you Bitch." *Trial Transcript* at 109. As he held her around the neck, he also pressed a knife against her right wrist with his right hand, resulting in minor cuts to her wrist. He then dragged her toward a nearby vehicle and tried to force her into the passenger seat. Williams fought back as they approached the vehicle. She managed to take hold of the vehicle's open door and then grab Williams's "groin area". *Id.* at 111. She was then able to push away from him and run into her house, where she immediately called the police.

The State subsequently charged Jones with class B felony criminal confinement, class C felony battery, class D felony strangulation, and class D felony invasion of privacy. Following a jury trial, Jones was convicted as charged except for the strangulation count,

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<sup>1</sup> Ind. Code Ann. § 35-42-3-3 (West, PREMISE through 2007 1<sup>st</sup> Regular Sess.).

upon which the jury could not reach a verdict. On November 14, 2007, the trial court imposed concurrent sentences of twenty years for criminal confinement, four years for battery, and one and one-half years for invasion of privacy. The remaining charge of strangulation was dismissed.

On appeal, Jones contends his dual convictions for criminal confinement and battery violate the Indiana double jeopardy clause, article 1, section 14 of the Indiana Constitution. Specifically, he claims there is a reasonable possibility that the facts used by the jury to establish the essential elements of the criminal confinement were also used to establish the essential elements of the battery.

Our Supreme Court has established a two-part test for analyzing state double jeopardy claims. According to that test, multiple offenses are the same offense in violation of article 1, section 14, “if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.” *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999). Jones raises his claim under the actual evidence test. Thus, we must determine whether there is a reasonable possibility that the evidentiary facts used by the jury to establish the essential elements of one offense may also have been used to establish all of the essential elements of the other offense. *See Davis v. State*, 770 N.E.2d 319 (Ind. 2002); *see also Bradley v. State*, 867 N.E.2d 1282 (Ind. 2007) (the proper inquiry is not whether there is a reasonable probability that the trier of fact used different facts, but whether it is reasonably possible it used the same facts to convict the defendant of both charges).

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<sup>2</sup> I.C. § 35-42-2-1 (West, PREMISE through 2007 1<sup>st</sup> Regular Sess.).

Under this inquiry, we may examine the evidence, charging information, final jury instructions, and arguments of counsel to determine whether each offense was established by separate and distinct facts. *See Goldsberry v. State*, 821 N.E.2d 447 (Ind. Ct. App. 2005); *see also Bruce v. State*, 749 N.E.2d 587, 590 (Ind. Ct. App. 2001) (“identification of the evidentiary facts used by the jury in reaching its decision may be informed by consideration of the final jury instructions and argument of counsel”), *trans. denied*.

Our review of the record reveals that although the instant criminal episode occurred over a relatively brief period of time, the battery and criminal confinement were not a single act. To be sure, the confinement clearly extended beyond that necessary to commit the battery. *Cf. Hopkins v. State*, 759 N.E.2d 633, 639 (Ind. 2001) (“where the confinement of a victim is greater than that which is inherently necessary to rob them, the confinement, while part of the robbery, is also a separate criminal transgression”); *Ely v. State*, 655 N.E.2d 372, 374 (Ind. Ct. App. 1995) (finding a double jeopardy violation where “[t]he evidence disclose[d] that no other confinement with a deadly weapon existed above and beyond that which was necessary to effectuate the battery with a deadly weapon”).

The evidence establishes that Jones placed Williams in a chokehold and held a knife to her wrist, resulting in lacerations to her wrist. At that point, the battery was complete. *See* I.C. § 35-42-2-1(a)(3) (defining battery, in relevant part, as a rude, insolent, or angry touching committed by means of a deadly weapon). Jones then dragged Williams, while still armed with a knife and with his arm around her neck, to his vehicle and tried to force her inside. This constituted a separate criminal act, that of criminal confinement. *See* I.C. § 35-42-3-3 (a)(1) and (b)(2)(A) (defining criminal confinement, in relevant part, as knowingly or

intentionally confining another person without the person's consent while armed with a deadly weapon). The State made clear during closing argument that the battery occurred when Jones cut Williams with the knife and the confinement occurred when he grabbed her and pulled her backwards against her will while armed with a knife.

Moreover, the confinement instruction and criminal information made no mention of the injuries from the knife but merely indicated that Jones was alleged to have been armed with a deadly weapon without alleging that he had used it. *See Bruce v. State*, 749 N.E.2d 587. On the other hand, when read together, the battery instruction and criminal information specified that Jones was alleged to have battered Williams with the knife, causing physical pain and/or visible injury.

We find that the instant case was prosecuted in a manner that insured the same evidence was not used to support both verdicts. Thus, we conclude there is not a reasonable possibility that the evidentiary facts used by the jury to establish the essential elements of confinement offense may also have been used to establish all of the essential elements of the battery offense.

Judgment affirmed

BARNES, J., concurs.

DARDEN, J., dissenting with separate opinion.

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STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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**DARDEN, Judge, dissenting**

I would hereby affirm Jones’ conviction for criminal confinement, but I respectfully dissent as to the holding that the convictions for criminal confinement and battery of Williams did not violate the Indiana Constitution’s prohibition against double jeopardy. Here, the State charged Jones with, and thus was required to prove, that he knowingly confined Williams while armed with a deadly weapon, “to wit, a knife . . . .” (App. 16). The State also charged Jones with, and thus was required to prove, that while armed with a deadly weapon, namely “a knife,” he knowingly or intentionally touched Williams in a rude, insolent, or angry manner. (App. 17). The jury instructions restated the charges.

Williams testified that “at that time when [Jones] had his arm around me and the knife

up against my right wrist, he was dragging me towards the white Blazer against my will and as he got me to the Blazer, . . . he basically tried to force me into the vehicle . . . .” (Tr. 111).

Williams also agreed that when Jones “had his arm around [her] neck or hand around [her] neck, and the knife against [her] wrist, that he was backing [her] up . . . .” (Tr. 120-21).

Given the charging information, instructions, and Williams’ testimony, I believe that there was a reasonable possibility that the jury used the same set of evidentiary facts to establish both the conviction for criminal confinement and battery. *See Bradley v. State*, 867 N.E.2d 1282, 1285 (Ind. 2007) (“Under the actual evidence test, the Indiana Double Jeopardy Clause is violated when there is a reasonable possibility that the evidentiary facts used to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.”). Accordingly, I would reverse Jones’ conviction for battery.